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Supreme Court, U.S.
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No. 96-1866

In The

Supreme Court of the United States

October Term, 1997

JEAN DOE and JANE DOE, a Minor,

Petitioners,

vs.

LAGO VISTA INDEPENDENT SCHOOL DISTRICT,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a public school district can be held liable under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.*, for hostile environment sexual abuse of a student by a teacher when the school district had neither actual nor constructive knowledge of that abuse.

LIST OF PARTIES

Plaintiffs/Petitioners:

Jean Doe, As Guardian and Next Friend of Jane Doe, A Minor (legal names are in the record)

Defendant/Respondent:

Lago Vista Independent School District

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Respondent Lago Vista Independent School District respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Fifth Circuit's opinion in this case. That opinion is reported at 106 F.3d 1223 (5th Cir. 1997).

STATEMENT OF THE CASE

A. Statement of Facts

Jane Doe was a student in the Lago Vista Independent School District (Lago Vista) in Travis County, Texas. (R. 346.) She was an intelligent student and, while still attending middle school, she participated in a high school level "great books" discussion group conducted by teacher Frank Waldrop. (R. 346.) No inappropriate behavior occurred at that time. (R. 346.) The following year, when Doe entered the high school as a freshman, Waldrop was again her teacher. (R. 347.) Over the course of the first semester, he engaged her in private conversations and singled her out for special attention. (R. 349-50.) In the spring of that year (1992) he began having sexual intercourse with her. (R. 352-53.) This relationship continued until Waldrop was arrested in January 1993.

None of the sexual activity alleged by Doe occurred on Lago Vista's property. (R. 353.) Doe did not inform any teacher or administrator of Waldrop's inappropriate behavior, nor was the relationship commonly known among the students or staff at Lago Vista. (R. 352-53.) Indeed, Doe participated in concealing her relationship with Waldrop because she knew that if she reported it, the relationship would be terminated immediately. (R. 353-54.)

The school district received only one prior complaint about Frank Waldrop that is relevant to this case. The parents of two of Waldrop's students complained to the principal about remarks

Waldrop had made in class. (R. 392.) Those remarks included the observation that some of the girls had "filled out" over the summer and an obscure reference to the size of some of the boys' belt buckles. (R. 392.) The principal, Michael Riggs, promptly investigated the complaint and set up a meeting between Waldrop and the parents. (R. 392.) He also admonished Waldrop to be more careful about his comments in the future. (R. 393.) Riggs did not receive any further complaints.

During at least a portion of the period in which Waldrop was engaging in sexual conduct with Doe, Lago Vista had in place written policies prohibiting any employee from sexually harassing a student. (R. 414-15, 417.) "Sexual harassment" was defined as including:

> such activities as engaging in sexually oriented conversations, telephoning students at home or elsewhere to solicit unwelcome social relationships, physical contact that would reasonably be construed as sexual in nature, and threatening or enticing students to engage in sexual behavior in exchange for grades or other school-related benefit.

(R. 417.)

The district also had a written complaint policy which provided that

> [a] student or parent who has a complaint alleging sexual harassment or offensive intimidating conduct of a sexual nature may request a conference with the principal or designee.

(R. 420.) The principal or designee was then required to hold a conference within five days and to coordinate an investigation

which was to be completed within ten days. (R. 420.) This procedure was not followed in the present case because neither Doe nor her parents made any complaint about Waldrop's conduct.[1] (R. 380.)

B. Proceedings Below

The United States District Court for the Western District of Texas rejected Doe's contention that Lago Vista should be held strictly liable for Waldrop's conduct because such a holding would not further Title IX's purpose of countering *policies* of discrimination in federally funded education programs. (R. 544-45.) The court concluded instead that:

> to prevail on a Title IX cause of action for personal injuries and damages, a plaintiff must show the school district had actual or constructive notice of the nature or type of discrimination alleged by a plaintiff or notice of circumstances which indicate a strong potential for the type of discrimination alleged by the plaintiff.

(R. 545.) Because there is no evidence in the present case that Lago Vista had actual or constructive notice of Waldrop's sexually discriminatory behavior, the court granted Lago Vista's motion for summary judgment on Doe's Title IX claim.[2] (R. 547.)

The United States Court of Appeals for the Fifth Circuit

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1. Doe's parents did not condone Waldrop's conduct, they were simply unaware of it because Doe concealed the relationship from them as well as from school officials. (R. 382).

2. The district court also granted summary judgment on Doe's claims for negligence and violation of § 1983, but Doe appealed only from the ruling denying her Title IX claim.

affirmed the order of the district court in accordance with its recent opinions in *Rosa H. v. San Elizario Indep. School Dist.*, 106 F.3d 648 (5th Cir. 1997), and *Canutillo Indep. School Dist. v. Leija*, 101 F.3d 393 (5th Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 2434, 138 L. Ed. 2d 195 (1997). The court reiterated its position that Title IX does not impose strict liability on a school district for sexual harassment of a student by a teacher. *Doe v. Lago Vista Indep. School Dist.*, 106 F.3d 1223, 1225 (5th Cir. 1997). It also rejected a theory of common-law agency, noting that such a theory "would generate vicarious liability in virtually every case of teacher-student harassment." *Id.* at 1226. The court concluded, as it had in *Rosa H.*, that:

> school districts are not liable in tort for teacher-student harassment under Title IX unless an employee who has been invested by the school board with supervisory power over the offending employee actually knew of the abuse, had the power to end the abuse, and failed to do so.

Id. There is no evidence in this case that any employee of Lago Vista with supervisory power over Waldrop had actual knowledge of his abuse of Doe.

REASONS FOR DENYING THE WRIT

This Court should deny Doe's petition for writ of certiorari because: (1) a recent guidance issued by the Office for Civil Rights may resolve the conflict among the courts of appeals; (2) Doe's assertion of inconsistent theories of liability at various phases of this lawsuit has impeded thorough deliberation of the question in the courts below; (3) Doe misconstrues this Court's opinion in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), the case on which she primarily relies; and (4) the facts of this case will abridge the Court's consideration of the full range of possible standards of liability.

I.

A RECENT SEXUAL HARASSMENT GUIDANCE ISSUED BY THE DEPARTMENT OF EDUCATION'S OFFICE FOR CIVIL RIGHTS MAY RESOLVE THE CURRENT CONFLICT AMONG THE COURTS OF APPEALS.

A. This Court declines to address issues that are likely to be resolved by the action of another appropriate entity.

A petition for writ of certiorari should be granted only if "special and important reasons" exist for doing so. *See Rice v. Sioux City Mem. Park Cemetery*, 349 U.S. 73-75 (1955). It is not sufficient that a case present an interesting problem because "this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants." *Id.* at 74. When it becomes apparent that action taken by another entity, such as a legislature or regulatory agency, may resolve the conflict presented in a petition for writ of certiorari, this Court should decline to grant the petition. *See Braxton v. United States*, 500 U.S. 344, 347-48 (1991) (Court declined to address sentencing guideline issue because Sentencing Commission "has already undertaken a proceeding that will eliminate circuit conflict").

This Court has not hesitated to dismiss a writ, even at an advanced stage of the proceedings, if it determines that "the case is not appropriate for adjudication." *Rice*, 349 U.S. at 79. For example, the issue in *Rice* involved the constitutional ramifications of a contract prohibiting the burial of a non-Caucasian in an Iowa cemetery. On motion for rehearing, after the judgment of the lower court had been affirmed because this Court was evenly divided, it was brought to the attention of the Court that the Iowa legislature had passed a statute preventing

such discrimination in the future. 349 U.S. at 73. The Court noted,

> in the absence of compelling reason, we should not risk inconclusive and divisive disposition of a case when time may further illumine or completely outmode the issues in dispute.

Id. at 77. It then dismissed the writ of certiorari as improvidently granted. *Id.* at 79-80.

The case at bar is one in which time may well "further illumine or completely outmode" the issue in dispute. For the reasons stated below, this Court should deny Doe's petition for writ of certiorari before further judicial resources are unnecessarily expended.

B. A recent OCR guidance will likely resolve the issue presented in this case.

Lago Vista agrees with Doe that the appropriate standard for measuring a school district's liability under Title IX for sexual abuse of a student by a teacher is currently unsettled. The courts of appeals and the district courts have employed a variety of standards, including strict liability, *see Bolon v. Rolla Public Schools*, 917 F. Supp. 1423 (E.D. Missouri 1996); an intentional discrimination standard borrowed from Title VI, *see Nelson v. Almont Community Schools*, 931 F. Supp. 1345 (E.D. Michigan 1996); a "knew or should have known" standard borrowed from Title VII, *see Doe v. Claiborne County*, 103 F.3d 495 (6th Cir. 1996) and *Kinman v. Omaha Public School Dist.*, 94 F.3d 463 (8th Cir. 1996); imputed liability under section 219(2)(b) of the Restatement (Second) of Agency, *see Seneway v. Canon McMillan School Dist.*, 969 F. Supp. 325 (W.D. Pa. 1997); imputed liability under section 219(2)(d) of the

Restatement (Second) of Agency, *see Kracunas v. Iona College*, 1997 WL 376912 (2d Cir. 1997); and the "actual knowledge" standard used by the Fifth Circuit in this case, *see Doe v. Lago Vista Indep. School Dist.*, 106 F.3d 1223 (5th Cir. 1997).

In response to confusion in the schools due, in part, to the varied standards of liability being applied by the courts, the Department of Education's Office for Civil Rights (OCR) issued a final policy guidance on March 13, 1997. This guidance specifically addresses a school district's liability for sexual harassment of a student by a teacher or other employee:

> [A] school will always be liable for even one instance of quid pro quo harassment by a school employee in a position of authority, such as a teacher or administrator, whether or not it knew, should have known, or approved of the harassment at issue. Under agency principles, if a teacher or other employee uses the authority he or she is given (e.g., to assign grades) to force a student to submit to sexual demands, the employee "stands in the shoes" of the school and the school will be responsible for the use of its authority by the employee or agent.
>
> A school will also be liable for hostile environment sexual harassment by its employees, i.e., for harassment that is sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from the education program or to create a hostile or abusive educational environment if the employee — (1) acted with apparent authority (i.e., because of the school's conduct, the employee reasonably appears to be acting on behalf of the school, whether or not the employee acted with authority); or (2) was aided in carrying out the sexual harassment of

students by his or her position of authority with the institution.

Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,039-40 (1997) (footnotes omitted). A school district is also liable under the guidance if it fails to take immediate and appropriate steps to remedy known harassment. *Id.*

Courts accord great deference to interpretations by the Office for Civil Rights when construing Title IX. *See Rowinsky v. Bryan Indep. School Dist.*, 80 F.3d 1006, 1014 n.20 (5th Cir.), *cert. denied*, __ U.S. __, 117 S. Ct. 165, 136 L. Ed. 2d 108 (1996) (citing *Cohen v. Brown Univ.*, 991 F.2d 888, 895 (1st Cir. 1993)); *see also Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986) (guidelines interpreting statute by enforcing agency "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance").

The Fifth Circuit in *Rosa H.* expressly acknowledged that the OCR was preparing a guidance on sexual harassment that conflicted with its holding in that case, but which was not yet in final form. *Rosa H.*, 106 F.3d at 658. It noted that because of the contractual nature of Spending Clause legislation such as Title IX, the guidance could not be given retroactive effect. *Id.* But it also acknowledged the possibility that the standard of liability it would apply in future cases might change to comport with the OCR guidance once it was finalized: "We make no comment on how these guidelines might affect cases in which a school district accepts Title IX funds after the guidelines' promulgation date." *Id.*

The courts have not yet had sufficient opportunity to determine the effect the OCR guidance will have on their prior holdings regarding a school district's liability under Title IX. Because the guidance addresses that issue in detail, and because

of the deference traditionally accorded the OCR's interpretation of Title IX, it may well be expected that promulgation of the guidance will resolve the inconsistencies that currently exist in the various circuits. In any event, it is appropriate that the courts of appeals be given an opportunity to apply the OCR guidance to resolve the conflicts between them before this Court intervenes.

At the time of the sexual abuse here at issue, at the time the district court granted summary judgment, and at the time the Fifth Circuit issued its opinion in this case, the OCR guidance had not yet been finalized. That guidance has no application in this case, but will likely be instrumental in the courts' construction of Title IX in future cases. Thus, even if this Court were to conclude in the present case that the Fifth Circuit erred in rejecting strict liability, that conclusion would amount to mere error correction, which does not justify the use of the Court's precious and finite resources. *See Rice*, 349 U.S. at 74 (Court does not sit for benefit of particular litigants).

It remains to be seen whether issuance of the OCR guidance resolves the conflict among the circuits. If it does, then intervention by this Court will not be necessary. If it does not, then this Court can address the issue in a more appropriate case — one in which discussion of the standard of liability has been developed in the context of the law in its present state, which includes the OCR guidance and its effect.

II.

DOE HAS ASSERTED INCONSISTENT THEORIES OF LIABILITY.

Even if the Court determines that the time is right to address what standard of liability applies to a school district in cases of teacher-student sexual abuse, this is not the right case. While

Doe's petition for writ of certiorari does not explicitly state the standard of liability she proposes for holding a school district liable under Title IX for sexual abuse of a student by a teacher, it appears that she is advocating the standard contained in section 219 of the Restatement (Second) of Agency — that a master is liable for the tort of his servant acting outside the scope of his employment if the servant was aided in accomplishing the tort by the existence of the agency relationship. This, however, is not the standard initially proposed by Doe.

Doe alleged in her live pleading that Lago Vista was *strictly liable* under Title IX for Waldrop's wrongful conduct. (R. 316.) In her motion for partial summary judgment, Doe explicitly rejected agency principles as supplying the standard of liability under Title IX: "A remedy requiring proof of agency or apparent agency is no remedy at all." (R. 335.) The district court specifically noted, "Plaintiff contends school districts are held strictly liable for the discrimination by their teachers in violation of Title IX." (R. 543.) The court rejected this theory and adopted a standard of liability requiring proof of actual or constructive knowledge of the discrimination or notice of circumstances indicating a strong potential for the type of discrimination alleged. (R. 545.) It did not discuss agency principles.

In framing the issue before the Fifth Circuit, Doe asked whether actual or constructive knowledge by school district officials is required by this Court's opinion in *Franklin v. Gwinnett County Indep. School Dist.*, 503 U.S. 60 (1992). Rather than pursuing her argument that the school district is strictly liable, she asserted that it was liable because of the high degree of authority it granted to teachers over students, which authority aided Waldrop in engaging in his illicit relationship with Doe. In short, Doe asserted that Lago Vista's liability rests on the principles stated in section 219(2)(d) of the Restatement (Second) of Agency.

The Fifth Circuit rejected strict liability as the Title IX standard of liability and noted that Doe was not pursuing a theory of liability based on constructive notice. *Doe v. Lago Vista Indep. School Dist.*, 106 F.3d at 1225. It then addressed (and rejected) Doe's agency theory, although that theory was not presented to the district court either in Doe's motion for partial summary judgment or in her response to Lago Vista's motion for summary judgment.

Lago Vista does not assert that Doe has waived or is estopped from raising the agency theory of liability. Rather, it points out the inconsistency in Doe's theories to alert the Court to the fact that the agency theory was not fully developed beginning at the district court level, and also to demonstrate that Doe has not exhibited strong commitment to the theories she has proposed.

It cannot be disputed that the standard for holding a school district liable under Title IX for the sexual abuse of a student by a teacher is of sufficient importance to require the attention of this Court (assuming that the issue does not resolve itself under the new OCR guidance). Nevertheless, the inconsistent positions taken by Doe in the proceedings below deprived the lower courts of the opportunity to analyze fully the contentions now at issue before this Court.

III.

DOE MISCONSTRUES THIS COURT'S OPINION IN *FRANKLIN v. GWINNETT COUNTY PUBLIC SCHOOLS*, 503 U.S. 60 (1992).

The present case is also not appropriate for review by this Court because Doe misinterprets and misapplies the case upon which she primarily relies.

A. The issue in *Franklin* was the availability of a monetary remedy.

Doe contends that this Court held in *Franklin* that a private cause of action exists under Title IX for sexual discrimination by educational institutions receiving federal financial assistance. (Petition for Writ of Certiorari at 6.) Lago Vista disagrees with this assessment of *Franklin. A* private cause of action under Title IX was first recognized by this Court in *Cannon v. University of Chicago*, 441 U.S. 677 (1979). The Court in *Franklin* expressly stated that it was not revisiting that question. 503 U.S. at 65. Rather, the issue in *Franklin* was whether the implied cause of action that the Court had already recognized in *Cannon* supported a claim for monetary damages. *Id.* at 62-63. The Court twice emphasized that "the question of what remedies are available under a statute that provides a private right of action is 'analytically distinct' from the issue of whether such a right exists in the first place." *Id.* at 65-66, 69. Because *Franklin* addressed only the *remedy* available under Title IX, it provides no support for Doe's agency theory of liability.

Doe places great emphasis on the following language from the Court's opinion in *Franklin:*

> Unquestionably, Title IX placed on the Gwinnett County Public Schools the duty not to discriminate on the basis of sex, and "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." We believe the same rule should apply when a teacher sexually harasses and abuses a student.

Id. at 75. By use of this language, the Court did not recognize a new cause of action but simply acknowledged that sexual abuse of a student by a teacher can constitute sexual discrimination

under Title IX, for which it had already recognized a cause of action. The context of the Court's statement was its discussion of whether the limitation on remedies for unintentional violations of statutes enacted pursuant to the Spending Clause should be extended to intentional violations of such statutes. Because the Court was not addressing the appropriate standard of liability for school districts, the above-quoted language cannot be read to foreclose a requirement of actual or constructive knowledge.

B. *Franklin* did not involve a claim under section 1983.

Doe also asserts that this Court's "rejection" of a section 1983 claim in *Franklin* "powerfully suggests" that the standard of liability under Title IX is lower than the standard under section 1983. (Petition for Writ of Certiorari at 8-9.) Lago Vista has been unable to find any reference that this Court considered, much less rejected, a section 1983 cause of action in *Franklin.* Indeed, the Eleventh Circuit's opinion in that case specifically noted that the court was not considering "the question of any legal rights which Franklin may or may not have under either: (1) state law; or (2) any federal statute other than Titles VI or IX." *Franklin v. Gwinnett County Public Schools*, 911 F.2d 617, 622 n.10 (11th Cir. 1990). Thus, Doe's analogy to section 1983 is without support.

C. *Franklin* is factually distinguishable.

The crucial difference between the facts in *Franklin* and the facts in the present case concern notice: the school district in *Franklin* had actual knowledge of the abuse and failed to take remedial action, *see* 503 U.S. at 63, but Lago Vista had no knowledge of Waldrop's abuse of Doe and no opportunity to remedy the situation. Doe attempts to minimize this distinction by stating that "the Court nowhere refers to this allegation as a crucial element in its holding." (Petition for Writ of Certiorari

at 10.) But certainly the existence of actual knowledge was significant to the Court's declaration that the case involved *intentional* discrimination. 503 U.S. at 74-75. Further, contrary to Doe's assertions, the Court did not emphasize that "from the district's standpoint the discriminatory conduct was both unintentional and unknown." (Petition for Writ of Certiorari at 10.) The Court explicitly recognized that the district *did* know of the abuse. 503 U.S. at 63.

IV.

THE FACTS OF THIS CASE WILL LIMIT THE COURT'S CONSIDERATION OF THE FULL RANGE OF POSSIBLE STANDARDS OF LIABILITY.

As noted above, the appropriate standard for measuring a school district's liability under Title IX for sexual abuse of a student by a teacher is unsettled. The courts have applied theories ranging from strict liability, *see Bolon v. Rolla Public Schools*, 917 F. Supp. 1423 (E.D. Missouri 1996), to requiring actual knowledge by a person in authority, *see Doe v. Lago Vista Indep. School Dist.*, 106 F.3d 1223 (5th Cir. 1997). This case would give the Court occasion to address only one end of that spectrum — the end least likely to resolve the current debate among the federal courts. Doe necessarily seeks to impose a strict liability standard because it is undisputed that Lago Vista had neither actual nor constructive knowledge of the abuse. Unless it adopts a strict liability standard, this Court could determine, at most, that *some* knowledge is required. It could not determine whether actual knowledge is required or whether constructive knowledge is sufficient, nor could it determine who in the school district must possess such knowledge. The standard of liability would remain undefined. Lago Vista respectfully suggests that a more appropriate case in which to address the standard of liability for a school district is one in which someone in the district

possesses some form of knowledge of the abuse. Only then can the questions of "who must have knowledge?" and "how much knowledge?" be answered.

A. There is no evidence to support any theory of liability based on *quid pro quo* discrimination.

Quid pro quo discrimination occurs when "the receipt of benefits or the maintenance of the status quo is conditioned on acquiescence to sexual advances." *Kinman*, 94 F.3d at 467. Hostile environment sexual harassment, on the other hand,

> occurs when unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct have the purpose or effect of unreasonably interfering with an individual's performance or creating an intimidating, hostile, or offensive environment.

Id.

The present case does not involve *quid pro quo* sexual harassment. There is no allegation and no evidence that Waldrop conditioned Doe's grades, advancement, or placement in his class on her acquiescence to his sexual advances. Doe never testified that she believed, or that Waldrop in any way conveyed, that her grades, advancement, or placement in his class were in any way dependent on maintaining a sexual relationship with him. Indeed, Doe herself has acknowledged the absence of *quid pro quo* evidence. (Petitioners' Fifth Circuit Brief at 11). Thus, the issue presented is narrowed to the standard of liability applied to a school district for hostile environment sexual harassment of a student by a teacher.

B. Doe's agency theory, in the context of this case, is equivalent to strict liability.

Doe asserts that Lago Vista is liable under agency principles because Waldrop was assisted in accomplishing the abuse of a student by his position as a teacher. *See* Restatement (Second) of Agency § 219(2)(d). But, as recognized by the Fifth Circuit, adopting such a standard

> would create liability for school districts in virtually every case in which a teacher harasses, seduces, or sexually abuses a student.

Rosa H., 106 F.3d at 655. An argument could be raised in every case that the teacher's opportunity to take advantage of the student was enhanced by

> the aura of an instructor's authority, the trust that we encourage children to place in their teachers, or merely the opportunity that teachers have to spend time with children.

Id.

Adopting the agency theory proposed by Doe would result in school districts being held liable under Title IX for any sexual misconduct committed by a teacher against a student, regardless of the district's lack of knowledge or its efforts to avoid or remedy the situation. In other words, the district would be strictly liable for a teacher's conduct outside the scope of his or her employment. For reasons stated below, strict liability is not appropriate in this context.

C. Strict liability is not an appropriate standard of liability under Title IX.

This Court declined to determine in *Franklin* whether Title IX was enacted under the Congress' Spending Clause power or under section 5 of the Fourteenth Amendment. 503 U.S. at 75 n.8. It did, however, discuss the contention that monetary damages cannot be recovered for unintentional violations of Spending Clause legislation because "the receiving entity of federal funds lacks notice that it will be liable for a monetary award." *Id.* The Court ultimately held that a monetary remedy was available in *Franklin*, but in that case, unlike the present case, the school district had actual knowledge of the abuse and failed to take appropriate remedial action. *See id.* at 64. The Court could thus conclude that the district in *Franklin* intentionally violated Title IX. No such conclusion can be reached where, as in the present case, the district has no knowledge of discriminatory conduct. If Lago Vista violated Title IX by not becoming aware of a relationship both parties concealed, its violation was unintentional and it cannot be held liable for damages. *See Franklin*, 503 U.S. at 74 (citing *Pennhurst State School and Hosp. v. Halderman*, 451 U.S. 1, 28-29 (1981)) (remedies are limited under Spending Clause statutes when violation is unintentional).

The Fifth Circuit has addressed Title IX as Spending Clause legislation and discussed the limitations placed on the statute because of that status. *Leija*, 101 F.3d at 398-99; *see also Davis v. Monroe County Board of Education*, No. 94-9121, 1997 WL 475207 (11th Cir. August 21, 1997) (Eleventh Circuit holds Title IX is Spending Clause legislation). It first noted that, in enacting Spending Clause legislation, "Congress must be unambiguous in expressing to school districts the conditions it has attached to the receipt of federal funds." *Leija*, 101 F.3d at 398; *see also Pennhurst*, 451 U.S. at 17 (Congress must speak with clear voice

in imposing conditions on receipt of federal funds). It then rejected strict liability as the standard to be applied because Title IX does not give notice that a school district will be strictly liable for sexual abuse committed by its teachers. *Id.* at 398-99. "Simply put, strict liability is not part of the Title IX contract." *Id.* at 399; *see also Pennhurst*, 451 U.S. at 17 (Spending Clause legislation is in the nature of contract).

Further, imposition of strict liability for teacher-student abuse is not supported by sound policy reasons. As discussed by the Fifth Circuit in *Leija*, analogies to the policy reasons for imposing strict liability on product manufacturers do not support imposing strict liability in this context. School districts do not have the same ability as manufacturers to spread liability costs nor are they in a position to discover human "defects" in the way a manufacturer can discover defects in its products. *Leija*, 101 F.3d at 399.

Imposing liability on a school district when it has neither actual nor constructive knowledge of sexual harassment will not further Title IX's purpose of eradicating sexual discrimination in educational institutions. Despite even exemplary efforts to comply with Title IX, every school district faces the possibility that it will unknowingly hire an abusive teacher or that a teacher with a previously impeccable record will, because of some personal crisis unknown to the district, engage in an illicit relationship with a student. The district, because it does not know of the abuse and has no reason to know of it, will have no opportunity to stop it. Instead, it will face potentially devastating financial liability with every hiring decision it makes. This, in turn, may have an adverse impact not only on future efforts to comply with Title IX, but on the district's ability to carry out its educational mission. Congress did not intend to eradicate sexual discrimination in schools by exposing school districts to potential financial disaster for concealed acts of sexual

discrimination of which the districts have neither actual nor constructive knowledge.

D. Conclusion.

The facts of this case would limit this Court's consideration to the narrow issue of whether a school district can be strictly liable under Title IX for hostile environment harassment of a student by a teacher. Because there is no issue of fact regarding actual or constructive knowledge, Doe's case would fail under any of the other theories proposed. Thus, if this Court rejects strict liability as the appropriate standard of liability, it will have no occasion to go further and determine which standard is appropriate. Such a narrow holding would do little to alleviate the confusion in this area because it does not appear that any of the courts of appeals have adopted strict liability in this context.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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